
The U. S. Administrative Process

Materials Prepared By

**THE ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES**

in connection with

A Workshop on the Administrative Process

April 3, 1995



What is the Administrative Conference of the United States?

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The Administrative Conference of the United States is an independent nonpartisan agency dedicated to reforming the administrative processes by which the federal government carries out the public's business. The Conference is the only federal agency whose exclusive charge is to make federal benefit and regulatory programs more effective, fair, and efficient. The Conference fulfills its responsibility in a cost-effective way by bringing together volunteer experts from the public and private sectors to research, recommend, and help implement improvements in administrative law and agency procedures.

Examples of the Conference's innovative work include:

- ♦ inventing procedures so citizens, businesses, and state and local governments can more easily shape agency rules and regulations
- ♦ promoting innovative alternatives to traditional regulation, such as audited self-regulation
- ♦ streamlining the Social Security Administration's ability to dispense benefits
- ♦ developing procedures to replace costly litigation with faster, less expensive consensual ways to resolve disputes
- ♦ encouraging agencies to establish ombudsmen to investigate and deal with citizen complaints about the way government treats them
- ♦ tailoring procedures to address the special needs of small business
- ♦ creating interagency working groups for sharing resources and solving practical problems
- ♦ developing procedures for citizens to use electronic technology to exchange information with the government and participate in policymaking
- ♦ removing artificial barriers to citizens' ability to challenge government rules and decisions
- ♦ developing procedures to help farmers avoid foreclosure on family farms
- ♦ developing the first-of-its-kind code of conduct for presidential transition team members.

The Conference, with only 20 employees, serves as a centralized resource on administrative procedure for Congress, the federal departments and agencies, and the general public. Activities include issuing formal recommendations, providing technical and drafting advice and assistance, publishing interpretive and training materials, and conducting seminars targeted to meet specific informational needs on procedures for government programs. The Conference staff has been the driving force behind the movement to improve dispute resolution procedures in federal agency programs.

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**Washington, D.C.
April 3, 1995**

The U.S. Administrative Process

10:30 a.m.

Structure of the U.S. Government
Chairman Rogers

11:00 a.m.

The Role of the Courts
Judge Smith

11:30 a.m.

The Administrative Process
Mr. Edles

12 Noon

Luncheon Program

Presenters

The Honorable Thomasina V. Rogers is Chair of the Administrative Conference of the United States, having been appointed by President Clinton in 1994. A career government lawyer, Ms. Rogers previously headed the 70-member Office of Legal Counsel at the Equal Employment Opportunity Commission and served in the U.S. Department of Education.

The Honorable Loren A. Smith is Chief Judge of the United States Court of Federal Claims. Judge Smith was formerly Chairman, and is currently a Senior Fellow, of the Administrative Conference of the United States and was Professor of Law at Delaware Law School from 1976 to 1984. He is an Adjunct Professor of law at Washington College of Law, American University and Georgetown University Law Center.

Gary J. Edles is General Counsel of the Administrative Conference of the United States. He previously served as Director of the Office of Proceedings at the Interstate Commerce Commission, as Deputy General Counsel of the Civil Aeronautics Board, and as an administrative judge at the Nuclear Regulatory Commission.

Structure of the United States Government

The longevity of the United States Constitution (over 200 years) is partly due to the relative stability of the society that it serves. Two other reasons for this long life are found in the document itself. First, it created a structure of government that has usually successfully avoided large concentrations of arbitrary power. Second, as amended by the Bill of Rights, it included guarantees of particular rights that have promoted the people's freedom.

Separation of Powers and Checks and Balances

The central purpose of the structure of the United States Government is to promote the rule of law, the concept that a "government of laws, and not of men" will govern according to neutral rules that apply to all citizens, and not according to arbitrary dictates of a particular ruler. The framers of the Constitution used two linked techniques to pursue this goal. The first was the separation of power-- the division of the federal government into three autonomous branches, each of which performs distinct functions. Hence, the legislature enacts laws, the executive enforces them, and the judiciary contrues them and ensures that they are consistent with the Constitution itself. By placing these different functions in the hands of different groups of officers, the framers hoped to avoid the potential for

arbitrary rule that occurs, for example, when the same individual or group makes rules and decides how to apply them.

The second technique, indispensable to the success of the overall scheme of separated powers, was partially to blend the activities of the three branches through defined "checks and balances." That is, in a compromise with the general principle of separating the branches, each was given certain roles in the operations of the others in order to keep a practical balance of power among them. For example, the President nominates judges and executive officers, but the upper house of the legislature, the Senate, must confirm them before they may take office. Similarly, The President has a role in the legislative process through his power to veto proposed legislation, which invalidates the legislation unless Congress repasses it by two-thirds majorities in both houses. The effect of these checks and balances within a broad scheme of separated powers has been to allow the other two branches to check almost any important exercise of power by one branch.

The disadvantage of this structure is that speedy and decisive government action is difficult to achieve, at least in domestic matters. (In matters of foreign policy and war, the President has special constitutional powers that grant him more latitude for immediate action, although the other branches still sometimes check him.) The advantage is that the rule of law is

relatively well assured, because broad assent by independent and differently constituted organs of government is needed before the people's liberties are affected.

Specific Constitutional Protections

The Constitution contains a number of provisions that have been important guarantees for the rule of law. Some of these are procedural in nature. One such guarantee is the availability of the writ of habeas corpus, which requires that the executive demonstrate a reason for any arrest to the courts. Another is the general prohibition against taking a person's life, liberty, or property without "due process of law." This phrase refers to procedures that the Anglo-American legal tradition regards as basic to fairness, such as an opportunity to confront witnesses against oneself. The Bill of Rights also contains a group of specific process requirements for criminal prosecutions, such as the right to a jury.

The most important substantive rights that are guaranteed by the Constitution are those to freedom of speech and religion, to freedom from arbitrary arrests and searches, to freedom from compelled self-incrimination, and to equal treatment under law. Without a populace that can engage in open political debate and criticism of its elected government, the United States would not enjoy the rule of law in a meaningful way.

The Place of Administrative Agencies Within A Constitutional System of Government

The Administrative Process The Administrative Procedure Act (APA) defines "agency" to include virtually every unit of the federal government except the Congress and the courts. The administrative process, however, is more narrowly confined to those agencies or government functions that affect private rights and obligations.

Delegation of Authority Article I of the U.S. Constitution places legislative power in the U.S. Congress and Article II places executive power with the President. When Congress passes laws creating a wide variety of regulatory, benefit and other government programs, it ordinarily delegates the implementation of those programs to administrative agencies that are units of the Executive Branch. Under Supreme Court rulings dating to the 1930s, Congress may lawfully delegate such authority to agencies, or confer discretion on an agency official to administer a program, as long as it has established some standard by which the agency or official is to act. However, such standards can be very general. For example, the Supreme Court has upheld legislation delegating authority to agencies to act "in the public interest," to disapprove rates that are not "just and reasonable," or to prevent "unfair methods of competition," while leaving to the agencies the power to define and interpret those phrases in particular situations.

Role of Agencies The responsibilities of administrative agencies vary tremendously. Some agencies have responsibility for supervising or regulating specific segments of the economy, such as transportation or banking, while other agencies have responsibilities that cross industry lines but are limited to specific subjects, such as ensuring worker health and safety or protecting the environment. Several agencies are responsible for the administration of large social welfare or insurance programs. Still other agencies are responsible for the oversight of government resources, such as the collection of taxes, the management of public lands, or the administration of government grants.

Place and Structure of Administrative Agencies In setting up administrative agencies, Congress has made some effort to create a structure and organization that will facilitate the accomplishment of the agency's mission or enhance the agency's accountability. The top management of virtually all administrative agencies are appointed by the President. Some agencies -- like the Cabinet departments -- are headed by a single individual who serves at the pleasure of the President and is among his most senior advisors. There are also a number of executive agencies headed by a single individual that are not cabinet departments. The Federal Aviation Administration, which is responsible for aviation safety, is such an agency.

Other agencies are multi-member boards or commissions that are also not part of the traditional cabinet departments. They are known as "independent agencies" because their members have fixed terms that generally are longer than that of the President, no more than a majority of the membership may come from the President's political party, and members may only be removed by the President for malfeasance in office or neglect of duty. Each member of an independent agency has an equal vote in establishing the general policy of the agency but one of the members is generally designated by the President to serve as a chairman. The chairman is ordinarily responsible for the day-to-day administration of the agency and may represent the agency before Congress or with the public.

Management by a single individual who serves at the pleasure of the President will presumably reflect the policy perspectives of the current administration quite closely. It may also be more efficient because a strong administrator can establish policy, create clear lines of responsibility for implementing that policy, and shift resources to accomplish priority tasks. A principal justification for placing decisional responsibility in the hands of a multi-member agency is to ensure that diverse perspectives are taken into account.

Concentration of Powers Within The Agency Congress generally gives agencies the legislative power to enact regulations or standards of general applicability governing subjects within the agency's area of competence, the executive power to bring enforcement action against private individuals to ensure compliance with the statutes and implementing regulations, and judicial power to adjudicate individual cases. The U.S. Supreme Court has ruled that this combination of functions within a single agency does not violate recognized principles of due process.

Safeguards Against An Abuse of Power There is a recognized danger in concentrating legislative, executive and judicial power in the hands of a single agency. There are three principal safeguards against the abuse of such power.

First, the APA establishes minimum procedures intended to ensure a fair and transparent system. The APA requires that agency processes are open to public observation and that, except in emergency situations, an agency act only after advising the public of the action it intends to take and soliciting public comment on its proposed action.

The APA also requires agencies to achieve some separation of functions by precluding the same employee from participating in prosecutorial and decisional functions in the same or related cases. As a practical matter, most agencies maintain an internal division of responsibility within the agency that insulates those employees who are part of the decisional process from those who enforce or litigate. However, the separation of functions requirement does not apply to the political head of the agency.

Second, almost all agency action is subject to review in by an independent judiciary. Suit may be brought by citizens who claim that the agency has acted beyond its authority or in an arbitrary manner or that the decision is not sufficiently explained or supported by the information on which the agency purports to rely.

Third, agencies are accountable to outside institutions, including the President, the Congress and other independent authorities.

Oversight of United States Government Agencies

This paper gives an overview of the major mechanisms for oversight of the operation of agencies of the federal government. It does not address two important oversight mechanisms: judicial review of agency action or Presidential control of agency rulemaking, which are covered elsewhere.

I. Legislative Oversight.

Administrative agencies are creatures of federal legislation. They depend on substantive legislation that sets forth their powers and the standards that govern their administration of federal programs. In addition, Congress controls the funding levels of agencies through two types of legislation. First, Congress establishes general funding levels (usually a maximum amount) through legislation that "authorizes" expenditures for agency programs. Such authorizing legislation may be permanent or for a fixed terms of years. In recent years there has been a trend toward annual or several-year authorizations to permit more frequent congressional review of agency performance.

Appropriations legislation establishes the actual level of funding of agency programs for the coming fiscal year. The United States Constitution gives the Congress the power to lay and collect taxes, and it provides that funds may be drawn from the Treasury only pursuant to appropriations made by law. Congress uses the annual appropriations process as a device for overseeing agency programs. The appropriations committees and subcommittees in each chamber, which differ from the committees that authorize the agency's programs, fix funding levels, and may restrict the precise purposes for which money may be spent.

Periodic oversight by Congressional committees. Each standing committee of Congress (other than the Committees on Appropriations and on the Budget) is required to review on a continuing basis the administration and effectiveness of the laws dealing with the subject matter over which the committee has jurisdiction. This includes examining the organization and operation of federal agencies having responsibility for the administration of those laws. The purpose of the review is to determine whether laws and programs created by Congress are being carried out in accordance with the intent of Congress and whether those programs should be continued or changed. Each agency is overseen by at least one committee each in the House of Representatives and the Senate, and many agencies have more than one oversight committee in a single chamber. Committee oversight is often conducted through public hearings and investigations. Agencies also keep committees regularly apprised of their activities through less formal means, such as periodic meetings between agency officials and committee members or their staffs. In this way, committee members and their staffs become experts in the workings of the agencies they review.

Investigations by the General Accounting Office. The General Accounting Office (GAO) is an arm of Congress created in 1921. Under the direction of the Comptroller General, the GAO conducts

audits of federal programs at the request of committees and members of Congress to ensure that public funds are properly spent. The Comptroller General also issues opinions on the lawfulness of proposed expenditures of agency funds, and those opinions are accorded great legal weight. The Comptroller General is appointed by the President to a single 15-year term, but the appointment is made from a list of three candidates given to the President by the leadership of the House of Representatives and the Senate. Once appointed, the Comptroller General can only be removed by Congress, not by the President.

II. Executive Oversight

Annual approval of agency budgets by the President's Office of Management and Budget. The Budget and Accounting Act of 1921 provides for a national budget system. Its basic requirement is that the President prepare and submit a unified executive branch budget to Congress each year. The 1921 Act established the Bureau of the Budget (now the Office of Management and Budget) to assist the President in preparing and implementing the executive budget.

Except in a few cases specifically authorized by Congress, executive agencies are prohibited from submitting their budget requests directly to Congress. In this way, the President, through the Office of Management and Budget, exercises oversight of executive agencies' programs.

About nine months before the President submits his budget to Congress, each agency formulates its individual budget request. Each agency then submits its request to a budget examiner who works for the Office of Management and Budget (OMB). In due course, OMB establishes a budget amount for each agency, which may be different from the agency's request. An agency may appeal an OMB decision, and final budget decisions are made by the President.

Inspectors General. In 1978, Congress enacted the Inspectors General Act to establish a new system for evaluating the operation of government programs and investigating allegations of fraud and other wrongdoing. Inspectors General (IGs) are located in most federal departments and agencies.

IGs are appointed by the President, and they can be removed by the President without a showing of cause. However, the Act states that IGs are to be selected "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." The Act also provides that each IG — not the President or agency head — is empowered to appoint an Assistant IG for Audit and an Assistant IG for Investigations. IGs also possess broad investigative powers. They are required by law to submit periodic reports of their investigations to agency heads and, without alteration, to the Congress.

The Administrative Conference of the United States. Congress created the Administrative Conference in 1964 as a permanent, independent agency to advise the President, the Congress, and federal agencies on ways to improve the fairness and efficiency of their administrative procedures,

including those used to conduct adjudications, rulemakings, and other agency activities. The Conference directs studies of the structure of government agencies and their administrative processes. Depending on the outcome of the research, the Conference may issue formal advice in the form of recommendations.

The Administrative Conference is headed by a Chairman who is appointed by the President, with the advice and consent of the Senate, for a term of 5 years. The Chairman acts as the chief executive officer of the Conference, presiding over its meetings and small staff of career employees. The Conference has an authorized membership of 101 members. The membership includes representatives of each of the principal government departments and agencies, plus academic authorities in the field of administrative law and other experts from private life who are knowledgeable about governmental processes. Except for the Chairman, all of the Conference's members serve part-time and without compensation. The Administrative Conference's overall direction is reviewed by a 10-member presidentially-appointed Council, half of whose members have traditionally been from the executive branch, and the other half from outside the government.

Ombudsman Offices. "Ombudsman" is a Scandinavian term that describes a senior official who investigates citizens' complaints about administrative acts or failures to act. Typically, an ombudsman investigates selected complaints and issues nonbinding reports, with recommendations addressing the problems or future improvements in agency processes or programs. Most European democracies and other countries such as Australia, New Zealand and Israel employ national ombudsmen who have jurisdiction to consider a broad range of complaints against government agencies.

After studying the experience of several United States' agencies with ombudsmen (including the Internal Revenue Service and the Army Materiel Command), the Administrative Conference in 1991 recommended creation of additional ombudsman offices in federal agencies that have significant interaction with the public. The Conference also concluded that to be successful ombudsmen should be persons of high rank and status with direct access to the highest level of authority. To this end, the Conference recommended adoption of guidelines for the tenure of office, salary, and safeguards to guarantee the independence and neutrality of the ombudsman.

THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act was signed into law by President Truman on June 11, 1946. In the months that followed, the Department of Justice compiled a manual of advice and interpretation of its various provisions. The *Attorney General's Manual on the Administrative Procedure Act*, published in 1947, remains the principal guide to the structure and intent of the APA. The *Manual* (page 9) states the purposes of the Act as follows:

- (1) To require agencies to keep the public currently informed of their organization, procedures and rules.
- (2) To provide for public participation in the rulemaking process.
- (3) To prescribe uniform standards for the conduct of formal rulemaking and adjudicatory proceedings (i.e., proceedings required by statute to be made on the record after opportunity for an agency hearing).
- (4) To restate the law of judicial review.

The Act imposes upon agencies certain procedural requirements for two modes of the agency decision making: rulemaking and adjudication. In general, the term "agency" refers to any authority of the government of the United states, whether or not it is part of another agency, but excluding the Congress, the courts, and the governments of territories, possessions, or the District of Columbia.

The Administrative Procedure Act has two major subdivisions: sections 551 through 559, dealing in general with agency procedures; and sections 701 through 706, dealing in general with judicial review. In addition, several sections dealing with

administrative law judges (§§1305, 3105, 3344, 5372, and 7521) are scattered through title 5 of the United States Code.

The Structure of the APA is shaped around the distinction between rulemaking and adjudication, with different sets of procedural requirements prescribed for each.

Rulemaking is agency action that regulates the future conduct of persons, through formulation and issuance of an agency statement designed to implement, interpret, or prescribe law or policy. It is essentially legislative in nature because of its future general applicability and its concern for policy considerations. By contrast, *adjudication* is concerned with determination of past and present rights and liabilities and is the administrative analogue of court proceedings. (Licensing decisions are considered to be adjudication.) The result of an adjudicative proceeding is the issuance of an “order.”

The line separating these two modes of agency action is not always a clear one, because agencies engage in a great variety of actions. Most agencies use rulemaking to formulate future policy, though there is no bar to announcing policy statements in adjudicatory orders. Agencies normally use a combination of rulemaking and adjudication to effectuate their programs.

Beyond the distinction between rulemaking and adjudication, the APA subdivides each of these categories of agency action into *formal and informal proceedings*. Whether a particular rulemaking or adjudication proceeding is considered to be formal depends on whether the proceeding is required by statute to be “on the record after opportunity for an agency hearing” (5 U.S.C. §§553(c), 554(a)). The Act prescribes elaborate procedures for both formal rulemaking and formal adjudication, and relatively minimal procedures for informal rulemaking. Virtually no procedures are prescribed by the APA for the remaining

category of informal adjudication, which is by far the most prevalent form of governmental action. Informal action may include inspections, contract matters, the approval of permits or applications, and various tests or examinations.

Excluded from the coverage of the Act are rulemaking involving military or foreign affairs functions and matters relating to agency management or personnel, public property, loans, grants, benefits, or contracts. However, they are neither mandatory nor intended to discourage agencies from using public participation procedures. On the contrary, when Congress enacted the APA, it encouraged agencies to use the notice-and-comment procedure in some excepted cases, and many agencies routinely do so in making certain kinds of exempted rules.

Section 553 sets forth three basic requirements for *rulemaking*: (1) notice of proposed rulemaking in the Federal Register, followed by (2) an opportunity for some level of participation by interested persons, and finally (3) publication of the rule, with a brief explanation of the agency's action, in most instances at least 30 days before the rule becomes effective. Sections 554, 556, and 557 set forth the basic requirements applicable to formal adjudication, such as agency enforcement proceedings.

Section 555 states various procedural rights of private parties, which may be incidental to rulemaking, adjudication, or the exercise of any other agency authority. Section 555(b) addresses appearances in agency proceedings by parties and provides a right to counsel in agency proceedings. Section 555(c) provides that a person compelled to submit data or evidence is entitled to a copy or transcript, except that in nonpublic investigations this may be limited to a right to inspect the official transcript. Additional

provisions of section 555 relate to subpoenas and to the requirement of prompt notice of denials of applications, petitions, or other requests made to agencies.

The principal amendments to the Administrative Procedure Act were the addition of the Freedom of Information Act (FOIA) in 1967 (5 U.S.C. 552) and the Government in the Sunshine Act in 1976 (5 U.S.C. 552b). The FOIA requires all agencies to (1) publish certain items of information in the Federal Register, (2) make available for public inspection and copying certain other types of information, and (3) make available all other government documents upon request, with certain exceptions. The exceptions are contained in nine specific exemptions that include, for example, classified information (exemption 1), personnel, medical and similar files where disclosure would constitute a clearly unwarranted invasion of personal privacy (exemption 6), and certain interagency or intraagency documents (exemption 5). The Sunshine Act requires, with some exceptions, that all meetings of multi-member agencies be open to public observation.

The Rulemaking Process

Informal rulemaking (also called “notice-and-comment” rulemaking) is one of the most significant innovations in the administrative process in the United States in the twentieth century. Informal rulemaking techniques produced a major expansion in the ability of government to regulate complex systems, in the areas such as environmental protection in the 1970’s and 1980’s. Until the 1960’s, the administrative process relied primarily upon trial-type, oral hearings, which proved time-consuming and cumbersome. Starting in the early 1970’s, Congress enacted numerous statutes delegating to agencies broad powers to make rules.

Most rulemaking proceedings involve *informal rulemaking*, where all that the APA requires for public participation is an opportunity to submit written data, views, or arguments; oral presentations may also be permitted. The published rule must incorporate a concise general statement of its basis and purpose. Despite the brevity of these requirements, it is important to note that Congress has routinely, through other statutes, added procedural requirements that affect various agency programs. These additional statutory requirements may apply to specific agencies or programs, or may be government-wide. Recent presidents have also imposed additional requirements for rulemaking, such as requiring agencies to undertake specific cost benefit analyses of proposed rules.

In recent years, some agencies have begun to use a technique known as “Negotiated Rulemaking” (sometimes shortened to “Reg Neg”), which is a process for participation by interested groups in negotiating the proposed rule that appears in the Federal Register. In Reg Neg, an advisory committee is chartered to draft a proposed

rule, ideally by unanimous agreement. The committee must include representatives of all groups affected by the regulation. The group is chaired by a neutral facilitator, and its meetings are open to public observation.

Not all matters are amenable to successful use of the Reg Neg process. For example, it may not be possible for all interested groups to be represented, and some issues are not of a nature that can be compromised. However, a large percentage of Reg Neg's succeed in reaching unanimous agreement. The principal benefits claimed for Reg Neg are a more rapid regulatory development process, better quality rules, and the avoidances of litigation following issuance of a rule. Negotiated rules are often better rules because they have been developed by persons with direct, practical knowledge who must find mutually beneficial approaches to get unanimous agreement.

Administrative Adjudication

Definition The Administrative Procedure Act (APA) divides all agency activity into two categories: adjudication and rulemaking. Each has its own procedural requirements. Adjudication typically involves the determination of specific facts and the resolution of individual controversies. The process for granting, denying or suspending individual licenses or permits; imposing civil fines or other sanctions; or issuing or refusing to issue social welfare benefits, are examples of adjudication.

Types of Adjudication Adjudication may be informal or formal. Unless a specific statute (other than the APA) requires that an adjudication be conducted through formal procedures, the adjudication is informal. Approximately 90 percent of government adjudications are made through informal procedures. Most of the adjudication requirements contained in the APA are *not* applicable to informal adjudication. Nevertheless, the courts have required that, when conducting an informal adjudication, an agency must adhere to some minimum procedures in order to ensure compliance with basic "due process" standards of fairness. Specific procedures vary from agency to agency but must include some provision for notice to affected parties of an agency's proposed action, an opportunity for those parties to respond, and a statement by the agency of the reasons for its action.

Who May Participate Many adjudications, particularly informal adjudications, involve only those who ask an agency to take some type of action. But it is not uncommon for members of the public or groups likely to be affected by an agency's decision to participate in agency adjudications, particularly formal adjudications. Individuals or organized groups, for example, may participate in a permit proceeding to oppose an application if they believe that issuance of the permit will result in environmental damage to their community. A company's competitors may oppose a license request. In some cases, a staff component of the agency will also participate in the adjudication. The staff may act as prosecutor in an enforcement case or represent the interest of the general public in other categories of cases.

Formal Procedures The procedural requirements for formal hearings are set out in sections 554, 566 and 557 of the Administrative Procedure Act and formal adjudications resemble non-jury judicial trial and appellate proceedings. Parties are entitled to notice of the legal and factual issues in controversy. In fixing the time and place for hearings, an agency must give due regard to the

convenience of the parties or their representatives. Participants have a right to be represented by a lawyer, introduce direct and rebuttal evidence, and cross examine witnesses. They are entitled to a decision based exclusively on a formal, public record, which includes the testimony and exhibits and all other documents. Participants in a hearing have a right to obtain relevant information in the hands of other parties, including the agency itself, either through a voluntary exchange of information or by compulsory process, such as issuance of subpoenas.

Separation of Functions The Administrative Procedure Act permits the combination of investigatory or prosecutorial and decisional authority within the same *agency*. The U.S. Supreme Court has ruled that this concentration of functions does not violate recognized principles of due process. Agencies nevertheless achieve a separation of functions through internal division of responsibility within the agency that insulates those employees who are part of the decisional process from those who enforce or litigate.

Administrative Law Judges The APA places ultimate decisional responsibility with the head of the agency, who is usually an individual or board or commission appointed by the President with the approval of the U.S. Senate. But the APA also created a special category of independent fact-finders -- called administrative law judges -- who preside over most agency hearings, hear the evidence personally, and issue decisions -- called initial or recommended decisions -- similar to those issued by trial judges.

Administrative law judges are civil servants who are employed by the individual agencies. However, the APA protects their decisional independence in several ways. Administrative law judges must go through a qualification process that is administered by a separate personnel agency of the U.S. government, not by any potential employing agency. Although individual agencies hire administrative law judges, they may hire only those individuals who have satisfied the prescribed requirements and are listed by the personnel agency on a register of qualified candidates. Once appointed, the pay of administrative law judges is set by the personnel agency, not the employing agency, and administrative law judges may be removed from office only after a hearing held before an independent administrative tribunal. Administrative law judges may not work for or be supervised by any member of the agency's enforcement or litigation staff. No party to a hearing may communicate with the administrative law

judge except on notice to other parties; there can be no "off-the-record" or secret efforts to influence the outcome of a case. There are approximately 1200 administrative law judges in the U.S. government who receive salaries comparable to other senior career civil servants.

Initial or Recommended Decisions The administrative law judge will render an initial decision or recommend a decision at the close of a hearing and must explain the disposition of all critical issues of fact, law or policy. Decisions must apply pertinent statutes and regulations to the facts of the case. Most initial or recommended decisions are in writing. Initial decisions become effective as the agency's decision unless a party seeks review by the agency or the agency, on its own initiative, decides to review the initial decision. As a practical matter, agencies rarely review initial decisions in the absence of a request from an affected party. Recommended decisions are automatically reviewed by the agency.

Agency Review of the Initial or Recommended Decision Section 557(b) of the APA provides that an agency has all the powers when reviewing an initial or recommended decision that it would have in making the decision in the first instance. Agencies, for example, may make their own, independent factual findings. However, agencies most often confine their review to important legal or policy issues. In reaching a decision, an agency is required by section 557(c) of the APA to carefully evaluate the initial or recommended decision issued by the presiding administrative law judge and explain its ruling on all critical issues of fact, law or policy.

Alternatives to Adjudication Because formal hearings can be time-consuming and expensive, agencies employ various techniques to encourage parties to resolve disputes by consent. Section 554(c) of the APA specifically provides that parties may propose settlement of a controversy and section 556(c)(7) and (8) gives the administrative law judge the power to encourage such settlements. The parties may agree to use an impartial mediator to facilitate settlement. Some mediators are paid by the agencies; others are paid by the private parties; still others are paid jointly by the agency and the private parties.

The Role of an Independent Judiciary

The United States Constitution places the federal judicial power in the Supreme Court and in lower courts that Congress creates as it desires. Today, there are two levels of lower federal courts. Trials are held in District Courts scattered around the nation; initial appeals go to Courts of Appeals, also organized regionally. The Supreme Court takes the cases that it wishes to hear from the Courts of Appeals and from the highest courts of the states. Thus, the Supreme Court tries to ensure the national uniformity of federal law, although it can review only a tiny fraction of the cases decided in the lower courts. The foregoing courts have general jurisdiction of federal matters; there are also specialized courts for particular subjects, such as tax and international trade.

The Constitution grants federal judges life tenure and protection against reduction in their salary. Hence the judiciary is quite independent of the other branches. Still, the other branches can affect its operations. Congress can decide how much money to give the courts for items other than judges' salaries and has broad control over the federal courts' jurisdiction of particular matters. Congress can also impeach and remove federal judges for serious misbehavior, but this is a rare event. The executive has discretion regarding how enthusiastically court

orders are enforced, and the nomination process described below also affects the behavior of the courts.

All federal judges are nominated by the President and must be confirmed by the Senate, so one House of Congress has a role in their selection. Presidents usually select judges after consultation with members of the Senate and with some private groups such as the American Bar Association. Presidents have various criteria for judicial nominee, such as experience and general philosophical agreement with him.

The federal courts review many kinds of governmental action for legality. Some activities of Congress or the President, however, are not reviewed. This occurs when the courts determine that a particular matter is committed by the Constitution to decision by the other branches. For example, Congress may determine its own internal procedures for impeachment decisions; the President may decide what is the true government of a foreign country. For the myriad of administrative actions that do not involve sensitive military or foreign affairs functions, though, the presumption is that the courts may review in the ways described below. Hence the administration of statutes regulating health, safety, environmental quality, and economic activity occurs under the watchful eyes of the courts.

Judicial review of government action is limited in nature.

It asks only certain defined questions, none of which are supposed to include policy matters that are assigned to the executive and Congress. First, the courts inquire whether the action is constitutional. Here, they examine the pertinent statute to see whether it invades constitutional rights, either on its face or as applied in the particular circumstances. Constitutional defects may be substantive in nature, such as a denial of free speech or equal protection. They can also be procedural in nature, such as a failure to accord due process of law. The other issues in judicial review are statutory in nature.

Second, courts inquire whether executive action is within the scope of the authority granted by statute. Here, courts ordinarily defer somewhat to the executive's interpretation of what a statute means, since the agencies have some expertise about the background of their statutes and about the problems of implementing them. Third, courts check for compliance with statutorily required procedures. These can be very simple, as for rulemaking, or quite detailed, as for adjudication. And fourth, courts ask whether executive action is substantively arbitrary. To determine this, they consider the persuasiveness of the agency's explanation for its decision, and see whether there is support for the decision in the record compiled by the agency. For example, an agency will be ordered to reconsider a decision if it ignores an important aspect of the problem at hand, or if its explanation is contrary to the evidence it has gathered.